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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-1672

BOISE CASCADE CORPORATION,
Petitioner,

versus

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL UNION NO. 7001,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
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PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Boise Cascade Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above-captioned case on February 8, 1979.

CITATIONS TO OPINIONS BELOW

The opinion of the arbitrator is unreported and is printed in Appendix A hereto, *infra* pp. 1a-14a. The

opinion of the district court is unreported and is printed in Appendix A hereto, *infra* pp. 15a-18a. The opinion of the Circuit Court of Appeals, printed in Appendix A hereto, *infra* pp. 20a-28a, is reported at 588 F.2d 127 and 100 LRRM 2481.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals, printed in Appendix B, *infra* pp. 28a-29a, was entered on February 8, 1979. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. Section 1254(1).

QUESTION PRESENTED

Whether a district court must defer to an arbitrator's award that is in direct conflict with the clear and unambiguous language of a collective bargaining agreement, when that collective bargaining agreement expressly forbids the arbitrator from altering its provisions.

STATUTE INVOLVED

The statutory provision involved is Section 301(a) of the Labor Management Relations Act (LMRA), 61 Stat. 156, 29 U.S.C. Section 185(a). LMRA Section 301(a) provides as follows:

> Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

STATEMENT

In April, 1975 Boise Cascade began a reduction in force. Certain employees, however, through the exercise of their seniority rights, elected to be downgraded in classification rather than to be laid off. Accordingly, they were downgraded, and their rates of pay were reduced. On April 17, the Steelworkers filed a grievance protesting the wage reduction of the downgraded employees.

The dispute was submitted to arbitration pursuant to Article XIII of the collective bargaining agreement between Boise Cascade and the Steelworkers. Article XIII provides, in pertinent part, that "[t]he Arbitrator shall have jurisdiction and authority to apply, interpret or determine compliance with the sections of the Agreement, but may, in no case, add to, subtract from, or alter in any way, any of the provisions of the sections." A hearing was conducted on October 10, 1975. At the hearing, Boise Cascade contended that the wage reductions were justified by Appendix A, Section 2A, of the collective bargaining agreement. Appendix A, Section 2A establishes rate retention for employees required to work at a lower-paying job, prohibits rate

retention for employees who voluntarily "bump" down to a lower-paying job, and permits an employee to go on layoff in lieu of bumping down:

> An employee who is required by the Employer to work on a job that carries a lower rate of pay than his regular rate of pay shall nevertheless continue to be paid at his current regular rate of pay. *This shall not apply when the employee elects to take such lower rated job through seniority rights, in which event he shall be paid at the applicable rate for such job but in no case more than the base rate thereof.*
>
> When an employee is offered, but not required to work on a lower rated job, instead of accepting work on such lower rated job, he may go on layoff, if he so desires, until work is again available for him on his regular job. (Emphasis added.)[1]

In an opinion issued on October 31, 1975, the arbitrator acknowledged that the above-quoted "contract language, standing alone, tends to favor the Company's position." Finding the language to be ambiguous, however, he concluded that Appendix A, Section 2A, did not permit wage reductions for employees who elected to be downgraded during a layoff.

1 Such provisions are quite common. *See, e.g., Bethlehem Steel Corp.*, 58 Lab.Arb. 259 (BNA 1972) (rate retention for employee involuntarily assigned to lower-paying job); *Longview Fibre Co.*, 66 Lab.Arb. 1076 (BNA 1976) (employee may voluntarily "bump" down to lower-paying job); *Gimbel Bros., Inc.*, 63 Lab.Arb. 67 (BNA 1974) (no rate retention for employee who voluntarily bumps down to lower paying job); *Aeronca, Inc.*, 68 Lab.Arb. 461 (BNA 1977) (employee displaced from former job may elect to go layoff rather than to bump down). *See also* 2 *Collective Bargaining-Negotiations and Contracts* 60:3 (BNA 1979) (67% of collective bargaining agreements in manufacturing industries contain bumping provisions).

On January 21, 1976, Boise Cascade filed an action in the District Court for the Middle District of Florida, pursuant to the Labor-Management Relations Act (LMRA) Section 301(a), 29 U.S.C. Section 185(a) (hereinafter "Section 301"), seeking to have the arbitrator's award vacated; the Steelworkers counterclaimed for enforcement. On December 16, 1976, the court heard oral argument on cross-motions for summary judgment. Holding that "[t]he language of the contract was clear and unambiguous," and that the arbitrator's award was in direct conflict with this language, the court granted Boise Cascade's motion. A judgment vacating the award was issued on December 28, 1976.

The court below rejected the district court's finding that Appendix A, Section 2A, of the collective bargaining agreement was unambiguous: "The arbitrator's determinations that the collective bargaining agreement was ambiguous . . . cannot be said to have no foundation in reason or fact." Accordingly, in a judgment entered on February 8, 1979, it reversed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

The decision below is "certworthy" for any one of five reasons. First, it ignores the mandate of this Court

in *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), and, in doing so, deviates from the holdings of other Circuit Courts of Appeal, who have scrupulously adhered to *Enterprise Wheel*. Second, insofar as it assumes the answer to a question left unresolved by *Enterprise Wheel* and its progeny, the decision below presents a novel issue of law. Third, it presents an issue concerning the proper working relationship between federal district courts and courts of appeal in actions under Section 301. Fourth, it constricts the jurisdiction of federal district courts. And fifth, it has far-ranging implications of great importance to many persons other than the parties to this case; specifically, the decision below will impede collective bargaining, a result obviously at odds with all that federal labor law is designed to achieve.

I. In *Steelworkers v. Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960), this Court stated that

> [A]n arbitrator is confined to interpretation and application of the collective bargaining agreement . . . . [H]is award is legitimate only so long as it draws its essence from the collective bargaining agreement. When an arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award.

Id. at 597. Although the foregoing standard has been characterized as "enigmatic," *see* Abrams, *The Integrity of the Arbitral Process*, 76 Mich.L.Rev. 231, 260 (1977), most Circuit Courts of Appeal have shown little hesitation in interpreting it to mean that an arbitrator's award is unenforceable where that award exceeds the arbitrator's contractual authority. *See, e.g., Torrington Co. v. Metal Products Workers*, 362 F.2d 677 (2d Cir. 1966); *H. K. Porter v. United Saw Workers*, 333 F.2d 596 (3d Cir. 1964); *Monongahela Power Co. v. Local 2332, IBEW*, 566 F.2d 1496 (4th Cir. 1976); *Amanda Bent Bolt Co. v. International Union, U.A.W.*, 451 F.2d 1277 (6th Cir. 1971); *Truck Drivers' Union v. Ulry-Talbert Co.*, 330 F.2d 562 (8th Cir. 1964); *Mistletoe Express Service v. Motor Expressmen's Union*, 566 F.2d 692 (10th Cir. 1977).

The lower courts have particularly agreed that, where a collective bargaining agreement prohibits an arbitrator from modifying or adding to the terms of that agreement, any award contravening unambiguous contract provisions is unenforceable:

> We are not persuaded that the Supreme Court . . . intended that the courts should permit an arbitrator to render decisions which do such violence to the clear, plain, exact and unambiguous terms of the submission and the contract of the contending parties.

Textile Workers of America v. American Thread Co., 291 F.2d 894, 899 (4th Cir. 1961). The Second Circuit echoed this view in *Torrington Co. v. Metal Products Workers, supra*, where the contract provided that "[t]he arbitrator shall

. . . have no power to add to . . . or modify, in any way, any of the provisions of this agreement" (*see* 362 F.2d at 678 n. 2):

> In some cases, it may be [an] appropriate exercise of an arbitrator's authority to resolve ambiguities in the scope of a collective bargaining agreement on the basis of prior practice . . . . However, . . . the mandate that the arbitrator stay within the confines of the collective bargaining agreement . . . requires a reviewing court to pass upon whether the agreement authorizes the arbitrator to expand its express terms on the basis of the parties' prior practice.

Id. at 680. Similarly, the Third Circuit has held that "the arbitrator had no ground upon which to base his interpretation of the clear and unambiguous words of the eligibility clause. Standing by itself, it gave him no room to construe it in any manner than [*sic*] according to its plain meaning." *H. K. Porter Co. v. United Saw Workers, supra,* at 602. *See also Mistletoe Express Service v. Motor Expressmen's Union,* 443 F.Supp. 1, 6 (W.D. Okla. 1976), *aff'd,* 566 F.2d 692 (10th Cir. 1977): "[t]he Arbitrator has simply disregarded the express agreement of the parties. This he has no authority to do. His authority is contractual and the agreement provides that he has no power to change the provisions thereof."

Consistent with the above decisions, the district court in the case *sub judice* held (1) that the controlling contractual provisions were unambiguous, and (2) that the arbitrator's award conflicted with those provisions. By reversing the district court's vacation of the arbitrator's award, the court below deviated sharply from the principles which were articulated in *Enterprise Wheel* and which have been followed in other circuit courts of appeal.

II. Necessary to the decision below is the assumption that, where an arbitrator determines a contract provision to be ambiguous, a district court must defer to that determination in deciding whether the arbitrator has added to or altered the provision in question. This is an issue which appears not to have arisen before. In past cases, the determination of ambiguity *vel non* has been made by the district court in the first instance;[2] in this case, it was first made by the arbitrator. Whether a district court must defer to an arbitrator's threshold finding of ambiguity is thus an issue of first impression, one well-suited for resolution by this Court.

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2 *See, e.g., Mistletoe Express Service v. Motor Expressmen's Union,* 443 F.Supp. 1 (W.D. Okla. 1976), *aff'd,* 566 F.2d 692 (10th Cir. 1977). In that case, Mistletoe Express instituted an action pursuant to Section 301 to vacate an arbitrator's award. In defense of this award, the union argued that the provision at issue was "ambiguous and susceptible to construction, and, therefore, the Arbitrator's decision [was] final and binding." 443 F.Supp. at 5. The district court rejected this argument: "The Court does not believe that an honest intellect could reach the result that this provision was ambiguous." *Id.* at 6.

III. Part and parcel of the issue whether district courts must presume the correctness of an arbitrator's determination that an ambiguity exists is whether circuit courts of appeal must presume the correctness of a district court's determination than an ambiguity does not exist. For if deference is warranted in the first instance, then it is unwarranted in the second, and vice versa. In other words, may an appellate tribunal review the merits of a district court finding, or is abuse of discretion the sole ground for reversal? *See General Warehousemen & Helpers Local 767 v. Standard Brands, Inc.*, 560 F.2d 700 (5th Cir. 1977), *rev'd on reh. en banc*, 579 F.2d 1282 (5th Cir. 1978):

> I think the District Court properly applied the applicable standard of judicial review in §301(a) suits for the enforcement of arbitration awards. The majority opinion approaches this appeal as if it were a question of whether we should withhold enforcement of the award. I believe that the true issue is whether the District Court abused its discretion when it denied enforcement.

560 F.2d at 708-709 (Coleman, J., dissenting). The instant case thus presents for determination a question involving the proper working relationship of the federal judiciary.

IV. The decision below effectively limits the review powers of district courts under Section 301. It has been

settled since *Enterprise Wheel* that district courts are not empowered to review the merits of an arbitrator's decision. But the decision below additionally erodes the district courts' power to determine whether the arbitrator exceeded the scope of his submission. In terms of its practical effect, the decision below directly addresses and reduces the jurisdiction of federal district courts.

V. Parties to a collective bargaining agreement are entitled to the benefit of their bargain. Where a provision is susceptible of more than one construction, parties to an agreement providing for arbitration have bargained for the arbitrator's construction, *see Enterprise Wheel*, 363 U.S. at 599 ("[i]t is the arbitrator's construction which was bargained for . . ."), and are entitled to have the courts safeguard that bargain. *See Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960). Likewise, where the parties have agreed upon unambiguous language, and have agreed not to permit the arbitrator to alter such language, they are entitled to have the courts safeguard this bargain as well. *Cf. Steelworkers v. Warrior Navigation Co., supra*, at 582: "The parties expect that the arbitrator's judgment will reflect not only what the contract says but, *insofar as the collective bargaining agreement permits*," other factors as well. (Emphasis added.) In other words, notwithstanding the crucial role of the arbitrator in collective bargaining agreements, Section 301 places upon federal district courts the primary responsibility of protecting the parties' bargain.

By depriving the district court of its ability to judge whether or not a provision is ambiguous, the court below effectively prevented it from assuring the reliability of clear language. And however important the gap-filling functions of arbitration may be, it is equally important that the parties be able to rely on the express words of a collective bargaining agreement. For unless a collective bargaining agreement is an instrument upon which the parties can rely, then it will, to that extent, be less worthwhile.

Consequently, the decision of the court below may well lessen the incentive of labor and management to hammer out agreements allocating rights and duties between them. While this disincentive is hardly likely to halt collective bargaining, parties will nevertheless be far less willing now to assume that a matter is "settled." This will result in harder bargaining, longer bargaining, and, inevitably, more frequent resort to economic force.

Additionally, arbitration clauses will tend to become narrower in response to what is, in effect, a carte blanche to arbitral caprice. For if simply reciting that a provision is ambiguous will justify whatever award follows, then such recitations are sure to become routine. Narrower arbitration clauses, of course, will increase the number of disputes subject to resolution by strikes, lockouts and other self-help measures.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue in this case.

Respectfully submitted,

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April ____, 1979

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that three true copies of the foregoing Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit were furnished by U.S. Mail this ____ day of April, 1979, to each of the following:

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APPENDIX

In the Matter of Arbitration
between
BOISE CASCADE CORPORATION
AND
UNITED STEELWORKERS OF AMERICA
AFL-CIO Local 7001
FMCS Case #75K17190

Appearances:

For the Company:
Thomas Bransford, Industrial Relations Manager

For the Union:
Frances Melancon, Staff Representative

OPINION AND AWARD

A grievance remaining unadjusted after the final step in the grievance procedure, said grievance was referred to the undersigned Arbitrator for final and binding decision. A hearing was conducted October 10, 1975 in Orlando, Florida.

ISSUE

Under appropriate provisions of the Agreement, did the Company improperly reduce the pay of affected

employees when their jobs were changed during a period of curtailment?

If so, what should the proper remedy be for employees so affected.

RELEVANT CONTRACT PROVISIONS

Article X: Seniority:

C. Plant Seniority:

4. In the event of a curtailment, employees may exercise their plant seniority to displace the most junior employee in the plant who fits into the following categories:

a. Employees with less plant seniority who hold nonladder jobs that the bumping employee has held on a permanent basis.

b. Employees with less plant seniority who are in the following jobs:

General Laborer
Packer

D. Progression Ladder Seniority is defined as the length of time an employee is permanently assigned to a progression ladder.

3. In the event of a curtailment in the progression ladder over one (1) day, employees will be moved down the ladder into each lower rung to which their progression ladder seniority places them.

Appendix A: Job Classifications and Wage Rates:

2. A. An employee who is required by the Employer to work on a job that carries a lower rate of pay than his regular rate of pay shall nevertheless continue to be paid at his current regular rate of pay. This shall not apply when the employee elects to take such lower rated job through seniority rights, in which event, he shall be paid at the applicable rate for such job but in no case at more than the base rate thereof.

When an employee is offered, but not required to work on a lower rated job, instead of accepting work on such lower rated job, he may go on layoff, if he so desires, until work is again available for him on his regular job.

D. If an employee is reduced to a lower rated job and is subsequently assigned to a higher rated job he has previously held, he shall not be required to repeat his

training period, but shall immediately receive the rate of pay he had previously attained for such job.

4. Nothing contained in this Appendix A shall diminish the regular hourly rate of any individual employee on the payroll as of the effective date of this Agreement. That is, any employee whose current rate exceeds the job rate shall continue to be paid his current rate.

FACTS

Opening Statement on Behalf of Employer:

Boise Cascade's Composite Can Plant located in Orlando, Florida is engaged in the manufacture of composite cans and the ends for those cans. The preponderance of the product mix is in frozen juice concentrate cans, with the balance in motor oil and other products. To manufacture these cans, the plant has eight can lines in different can sizes and constructions. In addition, the end manufacture requires an extensive metal processing operation.

The frozen juice concentrate business is highly seasonal in nature. At peak periods, all can lines and support equipment is running.

At low points, when business is curtailed much of the equipment is idle and workforce realignment becomes necessary. The Orlando workforce thus fluctuates from approximately 350 employees during full production down to some 200 during slack periods. These employees work in 25 distinct classifications, all with unique job duties and contractual rates of pay.

At such periods of time when workloads are curtailed, crewing is reduced in accordance with the number of lines to be run, job reassignments are made in line with skills and seniority, and management makes those decisions necessary to man the plant effectively and efficiently.

On the occasion which gave rise to the instant grievance, crew sizes were reduced and employees reassigned. However, wage rates were also reduced. This reduction in wage rates, the grievants contend, is improper according to contractual standards.

ARGUMENTS OF THE PARTIES

The Union presents several arguments tending to prove that the rate reductions, here involved, constitute a violation of the Labor Agreement. First, it relies on the language in Appendix A which it claims *clearly* precludes such rate reductions. Secondly, it

points to "past practice" which conforms with the Union's interpretation of Appendix A. Third, it is claimed there was no waiver of the employees rights, either contractually or by any actions of responsible Union representatives. Fourth, it calls attention to Section 4 of Appendix A which appears to reinforce the Union's argument that the Company had no right to reduce wage rates. Fifth, it points to the language in the minutes of the November 5, 1974 meeting and contends that the announcement of *future wage rate reduction* was a "feeler" or "trial balloon" to see how the Union would react to such announcement. Hence, it is further evidence that the Company was attempting to retract what past practice and contract language had established. Sixth, the Union acknowledges that the Company had certain needs in the years when the supply of labor was short, and that it has different needs at the present time. However, it contends, there are other solutions to these problems without the Company's unilaterally withdrawing rights previously given to employees. Seventh, it focuses on the words "lower rated job" and explains that this term does not necessarily refer to a job having a lower rate of pay, but refers, instead, to a job which employees progress through and look back on as a step in a progression. In other words, the term "lower rated job" does not carry the implication which the Company attributes to it. Eighth, and finally, the Union explains that the reference to employee's "electing to take lower rated jobs *through seniority rights*" existed in the 1968 contract to cover situations involving "down-bumping" in

situations unrelated to lay off procedures. Hence, the second sentence in Section 2A is not relevant to the instant case.

In its argument, the Company conceded that Appendix A, Section 2A appears to support the Union's position if the reader stops after the first sentence. However, the second sentence quickly changes the original impression and clearly establishes that there are two contractually proper methods for affecting a reduction-in-force. The first way involves *Management's assigning* the employee to a lower rated job, in which case he is entitled to his *regular* rate of pay. The second method permits the employee to exercise his seniority rights and demand the highest job which his seniority permits. In this case, the Company is obligated to pay only the actual rate of his lower rated job.

To support its argument that a rate reduction is anticipated by and provided for in the contract, the Company points to Section D. This Section, while not directly applicable to the instant case, tends to prove that rate reductions are not entirely excluded but are actually anticipated in particular situations.

With regard to the Union's reference to Section 4 of Appendix A, the Company contends that this provision is clearly irrelevant. Indeed, it is no more than a typical "Red Circle" provision stating that employees who might unintentionally be harmed by certain new contract language will be protected from a rate reduction.

Responding to the Union's assertion of rights due to "Past Practice" the Company admonishes the Ar-

bitrator that clear contract language, such as is found in Section 2A, must prevail over practice which is contrary to the intent of such contract language.

Finally, the Arbitrator is asked to consider the compelling reasons which prompted the Company's lay-off policies in the years when labor was scarce and the economic changes subsequent to those years. Accordingly, it was argued, the Arbitrator should interpret the Contract in the light of the problems which the parties anticipated and sought to solve.

DISCUSSION AND OPINION

Ironically, both the Company and the Union insisted that the contract language was so clear and unambiguous that there was neither need nor justification for the Arbitrator's admitting into evidence testimony or documents to explain it. According to the Company, the second sentence in Section 2A of Appendix A, clearly refers to a *lay-off procedure* wherein the Company permits an employee to choose between a down-bump and lay-off. However, the Union contends that this sentence refers to another form of down-bump, one which is unrelated to lay-off procedures. In the Arbitrator's opinion, the relevant contract language can be interpreted to support either position. Hence, it must be regarded as *ambiguous* and in need of clarification by whatever evidence is available.

When dealing with contract language that is subject to two or more interpretations the Arbitrator is not free simply to select the one which satisfies his sense of

justice and equity. He is obligated to refer to certain standards or guidelines which are accepted both in courts of law and arbitration. According to these standards, the Arbitrator must consider, first, how the disputed language came into the contract, that is, what problem it was designed to solve. According to the Company, the first and third sentences in Section 2A were intended as a mutually beneficial trade-off designed to solve the Company's loss of trained personnel during the summer slack period. To explain, the first sentence assures employees that their rates will not be cut if they are placed on lower skilled jobs. The trade-off is, employees so privileged, by rate retention, may not take a lay-off in lieu of such demotion. The second sentence, according to the Company, was included to give the Company an alternative procedure in lay-off, one that would permit it to cut rates if it did not fear loosing such employees.

Certainly the Company's explanation of this second sentence in Section 2A is logical. It purports to do what any Management would wish to do — safeguard its rights and provide maximum flexibility. However, this sentence can also be interpreted as unrelated to lay-offs and applicable only to voluntary, one time, down-bumps. Such down-bumps, according to the Union's testimony, were a concern of the parties both in 1968 and during the 1974 negotiations.

What can be learned from this inquiry into the apparent motives behind the contract language? The answer is, very little can be learned. Indeed, it appears that each of the parties entered negotiations with its

own understanding of the disputed contract language and in the absence of a thorough airing of the problem, concluded negotiations with the same misunderstanding.

When the parties to a contract fail to discover and remedy an ambiguous provision, how can the Arbitrator assign a *proper* interpretation?

The answer is, he must consider all information which was available to the parties when the most recent contract was consummated and determine, based upon such information, which party had a more valid reason for its interpretation. Or, conversely, which party, by its actions or inactions, could be viewed as more responsible for the misunderstanding.

In its argument, the Company sought to demonstrate that the Union should have known of the Company's interpretation because prior to the most recent contract negotiation several employees had actually had their rates cut at time of lay off. Moreover, the Company argued the Union's failure to protest such rate cuts tends to prove that the Company's lay-off procedure was accepted by the Union as proper.

Obviously, this evidence of actual rate cuts is relevant and quite persuasive. However, in the Arbitrator's opinion, it falls short of being decisive. As the Union correctly pointed out, the Company produced only about a dozen instances covering six years wherein rates were cut. Moreover, there is no evidence that these cases were ever brought to the attention of the Union. Nor, is it even clear that the employees

themselves were aware of the rate cuts because frequently paychecks were almost impossible to calculate due to the irregularity and amount of weekly overtime.

The Union, on the other hand, entered the 1974 contract negotiation with several valid reasons for its understanding of the disputed contract language. In the first place, in all the years that the disputed language had been in the contracts, 1968-1974, the Company had always (with the exception of the few instances previously mentioned) followed the same procedure. That procedure involved a notice to the employee to report to a lower skilled job at no reduction in pay.

In all the evidence presented, there is no indication that the Company ever called either the Union's or any employee's attention to the Company's interpretation. That is, at the time of lay-offs, which occurred every summer, employees were never advised of their rights or that the Company could have utilized a different procedure. Nor did the Company have different forms, or designations on personnel cards, indicating a two track lay-off procedure. Indeed, rather than being treated as a matter of personnel policy, which is supposed to motivate employees and build morale, the two track lay-off procedure was treated like one of the Company's most guarded secrets.

Under these circumstances, it is quite believable that the Union entered the 1974 negotiations with complete confidence that the existing contract language provided an absolute guarantee of rate retention. And, the

second sentence in Section 2A, which permits rate reduction, understandably caused the Union no concern because it seemed to apply to a letter of understanding which was worked out at the same negotiation. The details of this letter of understanding, which became a part of the contract, is set out below:

It is understood and agreed by the signatory parties that:

1. On a one-time only basis, employees other than those exceptions already provided for in Article X, Section K, will be allowed to bid to a job which has the same or a lower pay rate.
2. Employees will be allowed to do so under the following conditions:
   a. They must indicate their desire to down-bid or lateral bid in writing no later than December 1, 1974.
   b. Such down-bidding or lateral bidding will be allowed to take place only when a permanent vacancy occurs in the classification for which the employee has so indicated his interest within the period.
3. Employees will be allowed to express their desire to down bid or lateral bid only to jobs which they have held on a permanent basis or to general laborer and packer jobs.

4. Employees who are currently in the ladder will be allowed to bid to a lower job in the ladder but will be restricted to down bidding to only the lowest job in the ladder.

Another point raised by the Company is deserving of comment. This is its reference to Paragraph D which anticipates rate reductions under different circumstances. In the Arbitrator's opinion, this argument was adequately answered by the Union's acknowledgement that certain jobs, especially in maintenance, have presented opportunities for rate reduction. Hence, Paragraph D was not regarded as related to lay-off procedures, but to such jobs wherein rate reductions were acknowledged to be proper and actually had occurred.

In conclusion, the Arbitrator wishes to acknowledge that the present case is borderline and in many respects most unusual. That is, the Arbitrator is of the opinion that the contract language, standing alone, tends to favor the Company's position. Indeed, if the disputed contract provision had been called into question immediately after the 1968 contract was signed, this Arbitrator probably would have declared it to be somewhat unclear but nevertheless regarded the Company's interpretation as the more tenable. However, by 1974 the Company had conducted its affairs in a manner which gave a different meaning to the same contract language. For example, employees were *routinely* notified to report to lower skilled jobs in periods of lay-off and their higher rates were retained. Conversely, they were never told that the Company could have cut rates but it chose not to on this occasion.

When the parties entered negotiations for the 1974 contract the Company never called attention to its alleged right to cut rates even though it could have anticipated occasions in the near future when such rate cuts would be advantageous. Moreover, it should have realized that the Union believed rate retention was protected by the present contract language. Indeed, it is even probable that the Company knew or strongly suspected the Union's interpretation differed from the Company's or else why did the Company raise this issue at a meeting with the Union only 5 days after the 1974 contract was signed? Finally, removing the lay-off provision from the Seniority Section and placing it in the Appendix could have further misled the Union because the Appendix is a hodgepodge of afterthoughts and difficult to interpret in any context.

AWARD

For the reasons described herein the grievance is sustained.

SIGNED

/s/ JAMES J. SHERMAN
James J. Sherman,
Arbitrator

DATED:

STATE OF FLORIDA
COUNTY OF HILLSBOROUGH
CITY OF TAMPA

On this 31st day of October, 1975, before me personally appeared James J. Sherman to me known and known to me to be the person described in and who executed the foregoing instrument and he duly acknowledged to me that he executed the same.

/s/ BETTY JO JOHNSON
Notary Public

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

CASE NO. 76-25-ORL-CIV-R

BOISE CASCADE CORPORATION, etc.,
Plaintiff,

versus

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL UNION NO. 7001,
Defendant.

OPINION AND ORDER ON MOTIONS FOR SUMMARY JUDGMENT

This is an action by the Plaintiff Boise Cascade Corporation to set aside an arbitration award rendered in October, 1975, pursuant to the arbitration provisions of a collective bargaining agreement between the Plaintiff and the Defendant United Steelworkers of America, AFL-CIO, Local Union No. 7001. Jurisdiction of this Court is invoked pursuant to Section 301(a) of the Labor Management Relations Act, 29 U.S.C.A. §185(w). The question of whether the award is enforceable is brought to issue as a result of cross motions for summary judgment filed by each party. There are no material questions of fact.

The proper role for a court in reviewing an arbitrator's interpretation of the provisions of a collective bargaining agreement has been decided in numerous court decisions. These follow from court application of the standard established in the decision of the United States Supreme Court in 1960 in *United States of America* v. *Enterprise Wheel & Car Corp.*, 363 U.S. 593 (1960). This case admonishes arbitrators that their authority is not unlimited and is subject to court review:

> ". . . Nevertheless, an arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice. He may of course look for guidance from many sources, yet his award is legitimate only so long as it draws its essence from the collective bargaining agreement. *When the arbitrator's words manifest an infidelity to this obligation, courts have no choice but to refuse enforcement of the award."* (Emphasis added.) 393 U.S. at 597 (80 S.Ct. at 1361.)

In reviewing the award, this Court finds and concludes that the arbitrator exceeded his authority and did not reach his conclusion from the "essence of the collective bargaining agreement." In concluding that the grievance of the union was sustained, he necessarily concluded that the collective bargaining agreement provided for rate retention in the context of lay-offs. His conclusion was in direct conflict with the provisions of the agreement. The language of the contract was clear and unambiguous. See *Atlantic Lines, Ltd.* v. *Narwhal, Ltd.*, 514 F.2d 726, 730 (5th Cir. 1975). Since the arbitrator's decision was contrary to the terms of the collective bargaining agreement, it must be set aside. See *Amanda Bent Bolt Co.* v. *Auto Workers*, 451 F.2d 1277 (6th Cir. 1971).

For the foregoing reasons, the Court concludes that there is no genuine issue as to any material fact, the award should not be enforced, and the Plaintiff is entitled to a judgment as a matter of law. It is, therefore,

ORDERED that the motion of Plaintiff Boise Cascade Corporation for summary judgment is hereby

granted, and the motion of Defendant United Steelworkers of America, AFL-CIO, Local Union No. 7001, for summary judgment is hereby denied.

FURTHER ORDERED that the Clerk shall enter judgment for Plaintiff pursuant to Rule 58, Fed. R. Civ. P.

DONE AND ORDERED in Chambers at Orlando, Florida, this 23rd day of December, 1976.

/s/ JOHN A. REED, JR.
Judge

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Orlando, Florida 32802

FINAL JUDGMENT

(Number and Title Omitted)

Filed: Dec. 26, 1976

The Court having granted plaintiff's motion for summary judgment and denied that of defendant, it is

ORDERED AND ADJUDGED: (1) The arbitration award which is the subject of this action is not enforceable and, therefore, vacated;

(2) The defendant shall have and take nothing by its counterclaim;

(3) Costs, if any, shall be taxed in accordance with law and the Federal Rules of Civil Procedure.

DONE AND ORDERED at Orlando, Florida, this 28th day of December, 1976.

/s/ JOHN A. REED, JR.
UNITED STATES DISTRICT JUDGE

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BOISE CASCADE CORPORATION, etc.,
Plaintiff-Appellee,

versus

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL UNION NO. 7001,
Defendant-Appellant.

No. 77-1392.

United States Court of Appeals,
Fifth Circuit.

Jan. 17, 1979.

Appeal from the United States District Court for the Middle District of Florida.

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

WISDOM, Circuit Judge:

The United Steelworkers of America (the union) appeals the district court's order vacating an arbitrator's award. We agree with the union that the district court's order exceeded the proper scope of judicial review of labor arbitration awards. Accordingly, we reverse.

Boise Cascade Corporation (the employer) operates a plant in Orlando, Florida, in which it manufactures cans. The employer and the union entered into a collective bargaining agreement for this plant. Article XIII of that agreement provided for binding arbitration of grievances. In part, it stated:

> The Arbitrator shall have jurisdiction and authority to apply, interpret, or determine compliance with the sections of the Agreement but may, in no case, add to, detract from, or alter in any way, any of the provisions of the sections. Decisions of the Arbitrator shall be final and binding on the Union, the Employer, and the employee.

On April 17, 1975, the union filed a grievance complaining that the employer had paid reduced hourly wages to certain employees who had elected to accept

temporary jobs with lower paying classifications rather than be temporarily laid off. The union asserted that, by reducing the wages paid to these workers, the employer had violated Appendix A of the collective bargaining agreement. The relevant portions of Appendix A provide as follows:

> 2. A. An employee who is required by the Employer to work on a job that carries a lower rate of pay than his regular rate of pay shall nevertheless continue to be paid at his current regular rate of pay. *This shall not apply when the employee elects to take such lower rated job through seniority rights, in which event, he shall be paid at the applicable rate for such job but in no case more than the base rate thereof.*
>
> When an employee is offered, but not required to work on a lower rated job, instead of accepting work on such lower rated job, he may go on layoff, if he so desires, until work is again available for him on his regular job.
>
> . . . .
>
> D. If an employee is reduced to a lower rated job and is subsequently assigned to a higher rated job he has previously held, he shall not be required to repeat his training period, but shall immediately receive the rate of pay he had previously attained for such job.

(Emphasis added).

In the hearing before the arbitrator, both the union and the employer argued that Appendix A clearly and unequivocally supported their respective positions. The arbitrator determined, however, that Appendix A was ambiguous. The arbitrator then examined evidence extrinsic to the agreement to aid his construction of Appendix A. He concluded that the employer's past practices supported the union's argument that the italicized sentence in Appendix A that is quoted above applied only when an employee *not* faced with a layoff voluntarily elected to take a lower-paying job "through seniority rights".

The employer filed this action to set aside the arbitrator's award. The district court granted the employer's motion for a summary judgment to vacate the award because the court found that the arbitrator's order exceeded his authority and did not draw its essence from the collective bargaining agreement. The court believed that the language in Appendix A clearly and unambiguously provided that an employee would not retain his hourly wage rate when he chose to accept a lower-paying job temporarily rather than be laid off.

The scope of the judicial review of arbitration awards is limited. The Supreme Court's seminal decisions on this issue are the *Steelworkers Trilogy: Steelworkers v. American Manufacturing Co.*, 1960, 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; *Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; *Steelworkers v. Enterprise Wheel & Car Corp.*,

1960, 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424. The Court in *Enterprise Wheel* held that

> the question of interpretation of the collective bargaining agreement is a question for the arbitrator. It is the arbitrator's construction which was bargained for; and so far as the arbitrator's decision concerns construction of the contract, the courts have no business overruling him because their interpretation of the contract is different from his.

363 U.S. at 599, 80 S.Ct. at 1362. Similarly, the Court in *Warrior & Gulf* stated that "judicial inquiry . . . must be strictly confined to the question whether the reluctant party did agree to arbitrate the grievance or did agree to give the arbitrator the power to make the award he made". 363 U.S. at 582, 80 S.Ct. at 1353.

The premise of the *Steelworkers Trilogy* is that the court should allow the parties to a collective bargaining agreement containing a binding arbitration clause to receive the benefit of the bargain — *binding* arbitration on contract disputes. Professor St. Antoine recognized the soundness of this doctrine when he wrote:

> Put most simply, the arbitrator is the parties' officially designated "reader" of the contract. He (or she) is their joint *alter ego* for the purpose of striking whatever supplementary bargain is necessary to handle the anticipated unanticipated omissions of the initial agreement. Thus, a "misinterpretation" or "gross mistake" by the arbitrator becomes a contradiction in terms. In the absence of fraud or an overreaching of authority on the part of the arbitrator, he is speaking for the parties, and his award *is* their contract.

St. Antoine, *Judicial Review of Labor Arbitration Awards: A Second Look at Enterprise Wheel and Its Progeny*, 75 Mich.L.Rev. 1137, 1140 (1977). This Court has followed this doctrine time and again. In *Safeway Stores v. Bakery Workers Local 111*, 5 Cir. 1968, 390 F.2d 79, 83-84, we stated that any "likelihood [of an 'unpalatable' arbitral award] is the by-product of a consensually adopted contract arrangement . . . . The arbiter was chosen to be the Judge. The Judge has spoken. There it ends." *See, e.g., Electrical Workers Local 1000 v. Markle Manufacturing Co.*, 5 Cir. 1978, 582 F.2d 9, 11 (per curiam) (citing cases).

The courts have fashioned few exceptions to the finality of arbitration awards.[1] In *Enterprise Wheel*, the Supreme Court stated that the arbitration award "is legitimate only so long as it draws its essence from the collective bargaining agreement". 363 U.S. at 597, 80 S.Ct. at 1361. This Court has interpreted this limitation as calling for vacation of an arbitrator's award only when it is "without foundation in reason or fact". *Machinists District No. 145 v. Modern Air Transport, Inc.*, 5

1 For a general discussion of these exceptions, see St. Antoine, *supra*, 75 Mich.L.Rev. at 1150-60.

Cir. 1974, 495 F.2d 1241, 1244, *cert. denied*, 419 U.S. 1050, 95 S.Ct. 626, 42 L.Ed.2d 644. These standards require us to conclude that the district court erred when it vacated the arbitration award attacked by the employer. The arbitrator's determinations that the collective bargaining agreement was ambiguous and that extrinsic evidence favored the union's position cannot be said to have no foundation in reason or fact. His award, then, passes muster under the *Steelworkers Trilogy* and *Modern Air Transport*.[2]

The employer argues that, when the arbitrator considered extrinsic evidence in formulating his construc-

2 This case is distinguishable from *Communication Workers v. Western Electric Co.*, 1975, N.D.Ga., 397 F.Supp. 1318, *aff'd*, 5 Cir. 1977, 558 F.2d 816 (per curiam). In that case, the employer had suspended an employee who had been arrested. When the criminal charges were dismissed, the employer reinstated the employee without backpay. The employee filed a grievance under the collective bargaining agreement, which expressly provided that the arbitrator's authority was "limited to a determination of whether or not the Company has acted unreasonably in suspending . . . such Employee". Under the agreement, an employee who had been unreasonably suspended automatically received backpay. The arbitrator determined that the employer had acted reasonably when it suspended the employee but had acted unreasonably when it denied him backpay upon reinstatement. Accordingly, the arbitrator awarded backpay to the employee. The district court refused to enforce this award, holding that the arbitrator had exceeded his authority under the agreement.

Western Electric is consistent with the doctrine that courts will enforce clear contractual limitations on the authority of the arbitrator. *See Steelworkers v. Warrior & Gulf Navigation Co.*, 1960, 363 U.S. 574, 585, 80 S.Ct. 1347, 4 L.Ed.2d 1409; *Electrical Workers Local 278 v. Jetero Corp.*, 5 Cir. 1974, 496 F.2d 661. In contrast, the employer in this case does not argue that the collective bargaining agreement barred the arbitrator from deciding the issue in dispute. Rather, the employer simply asserts that the arbitrator misread the agreement and decided the issue incorrectly.

tion of the ambiguity he saw in the collective bargaining agreement, he violated the agreement's requirement that he not "add to, detract from, or alter in any way" any provision of that contract. We disagree. An arbitrator faced with the task of interpreting an arguably ambiguous contract provision may look to extrinsic evidence for assistance. The Supreme Court in *Warrior & Gulf* stated:

> The labor arbitrator's source of law is not confined to the express provisions of the contract, as the industrial common law — the practices of the industry and the shop — is equally a part of the collective bargaining agreement although not expressed in it.

363 U.S. at 581-82, 80 S.Ct. at 1352. The "no additions or alterations" clause must not be read as precluding an arbitrator from considering extrinsic evidence to explain an agreement that may rationally be considered ambiguous. A contrary result would allow that clause to override the parties' express desire to provide for "final and binding" arbitration. *See Piggly Wiggly Operators' Warehouse, Inc. v. Piggly Wiggly Operators' Warehouse Indep. Truck Drivers Union, Local No. 1*, 1977, W.D.La., 438 F.Supp. 164, 168.[3]

REVERSED.

3 Professor St. Antoine agrees:

> The difficulty is that any time a court is incensed enough with an arbitrator's reading of the contract and such supplementary data as past practice, bargaining history, and the "common law of the shop," it is simplicity

itself to conclude that the arbitrator must have "added to or altered" the collective bargaining agreement. How else can one explain this abomination of a construction? Yet if the courts are to remain faithful to the injunction of *Enterprise Wheel*, they must recognize that most arbitral aberrations are merely the product of fallible minds, not of overreaching power. At bottom, there is an inherent tension (if not inconsistency) between the "final and binding" arbitration clause and the "no additions or modifications" provision. The arbitrator cannot be effective as the parties' surrogate for giving shape to their necessarily amorphous contract unless he is allowed to fill the inevitable lacunae.

75 Mich.L.Rev. at 1153 (footnote omitted).

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 19

No. 77-1392

D.C. Docket No. CA 76-25-ORL-CIV-R

BOISE CASCADE CORPORATION, ETC.,
Plaintiff-Appellee,

versus

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, LOCAL UNION NO. 7001,
Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

Before WISDOM, AINSWORTH and CLARK, Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the order of the District Court appealed from, in this cause be, and the same is hereby, reversed;

It is further ordered that the plaintiff-appellee pay to the defendant-appellant the costs on appeal, to be taxed by the Clerk of this Court.

January 17, 1979

Issued As Mandate: FEB. 8, 1979